COMMONWEALTH OF KENTUCKY
30th JUDICIAL DISTRICT

No.19-CI-01063

JEFFERSON CIRCUIT COURT
DIVISION TEN
JUDGE ANGELA MCCORMICK BISIG

JOHN P. ASKIN
5910 Mt. Pleasant Drive
Prospect, Kentucky 40059 PLAINTIFF

v.

UNIVERSITY OF NOTRE DAME, DU LAC
400 Main Building,
Notre Dame, Indiana 46556 DEFENDANT

and

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
700 W. Washington Street
Indianapolis, Indiana 46204 DEFENDANT

OPPOSITION OF PLAINTIFF JOHN ASKIN
TO DEFENDANTS' MOTION TO DISMISS

Plaintiff John Askin respectfully submits this Memorandum in Opposition to the Motion to Dismiss filed by Defendant University of Notre Dame ("Notre Dame") and joined by Defendant National Collegiate Athletic Association ("NCAA").

INTRODUCTION

This is a latent disease case. It is controlled by well-developed jurisprudence in Kentucky that applies the discovery rule to circumstances where a plaintiff was exposed years earlier to a harmful circumstance that laid the seed of a latent life-altering disease the plaintiff developed many years later and discovered via a competent medical diagnosis. Under those circumstances, Kentucky's one-year limitations period begins to run from the time the plaintiff knew he had the latent brain disease at issue, the defendant's culpable conduct, and a claim. For

John Askin, that limitation period commenced within one year before he filed the Complaint; that is, in February 2018, when he was diagnosed by a qualified neurologist with neurodegenerative brain disease cause by head impacts in football.

The Verified Complaint shows that John Askin sustained unrecognized and un-treated transient concussive symptoms as a college player and, therefore, was exposed without his knowledge to an elevated risk of latent brain disease when he played football at Notre Dame. More than thirty years later, he was diagnosed by a competent neurologist with latent neurodegenerative brain disease caused by football. Contrary to Defendants' arguments, there is no allegation that John Askin knew he had a brain injury in college, knew the Defendants engaged in misconduct, or knew he had a claim against them at age 22. To the contrary, the Verified Complaint says the opposite. It states that John Askin never knew or recognized that repetitive head impacts in football he sustained were concussive or sub-concussive events that exposed him to a risk of developing latent brain disease later in life.[1] John Askin uses the word latent nearly sixty (60) times to characterize his current brain disease.

And there is more. The Verified Complaint also alleges that Notre Dame provided players with pre-game and pre-practice medications to mask symptoms, to prevent players from recognizing symptoms of injury, and to keep the players on the field. Those included a cream used on player muscles that normally is used on race horses and a mixture of drugs known as Supac, which contained elevated levels of aspirin, acetaminophen, and caffeine.[2] These methods substantially elevated the risks to John Askin of latent brain disease in two ways: (a) it made him less likely to recognize a symptom and remove himself from games and practices; and (b) it made it more likely that he would sustain repeat sub-concussive and concussive head impacts in

[1] *See* Verified Complaint at ¶¶ 11-12, 66, 76, 78-81, 173, and 176.
[2] Verified Complaint at ¶¶ 96-97.

the same Notre Dame games and practices, because he would not leave the field.[3] This happened at a time when the Defendants clearly and unequivocally had an absolute duty to protect the health and safety of student football players, including John Askin. At a minimum, both Defendants were obligated to understand and communicate the risks of harm to John Askin, including the risks of latent brain disease, and to take steps to minimize those risks, not aggravate them. They did nothing to protect the players. NCAA ignored the risks, and Notre Dame aggravated the risks.[4] Now, 34 years later, John Askin suffers from latent and debilitating neurodegenerative disease caused by one thing: repetitive head impacts in college football.

At age 18-22, John Askin did not know (and could not have known) that the transient symptoms he and other student football players at Notre Dame sustained from repetitive head impacts were anything to be concerned about. He also did not know (and could not have known) that these transient incidents (which he did not recognize as an injury at all)[5] would later manifest as latent neurodegenerative disease. That disease is completely different from the transient symptoms that arise from concussive and sub-concussive head impacts during games and practices in college football.

The Defendants in their Motion mischaracterize the symptoms as a cognizable injury (they are not) that John Askin recognized as latent brain disease (he did not; it was unknowable to him and took more than thirty years to manifest) for which he has sued. *See* Motion at 1. This is precisely what these very same Defendants argued in *Schmitz v. NCAA,* et al.,[6] and the

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[3] *See* Verified Complaint at ¶¶ 169-174.
[4] Notre Dame also aggravated the risks of latent brain disease to John Askin by urging players to lead with their helmeted heads in practices and games. *See* Verified Complaint at ¶ 139.
[5] *See* Verified Complaint at ¶¶ 78, 81-82, 86, and 171-173.
[6] The Ohio Supreme Court's opinion in *Schmitz v. NCAA* is attached as Exhibit 1. The Opinion of the Ohio Eighth Appellate District is attached as Exhibit 2, *Schmitz v. NCAA*, 67 N.E. 2d 852 (8th Dist. Cuyahoga 2016)..

Defendants lost that and every other argument in an opinion by the Supreme Court of Ohio a mere seven months ago. In *Schmitz*, the Defendants mischaracterized the allegations of that complaint in an attempt to re-create *Schmitz* as an "extent of the injury" case, and they are doing the same thing here, but citing *Caudill v. Arnett*, 481 S.W.2d 668 (Ky. 1972), an extent of the injury case in which the which the plaintiff knew he was injured the moment of a school bus accident, knew that the bus company was at fault, and knew he had a claim. This case is completely different. Simply put, John Askin pleads that he suffers from a latent brain disease he did not discover until late in life and never knew of any injury (or wrongdoing of Defendants) that lead to that disease until a competent medical professional diagnosed it. John Askin married soon after college, obtained employment, and raised four children. He led a cognitively normal life for decades.

If this Court were to accept Defendants' arguments, then John Askin would have been required to bring a claim within one year of finishing college football. At that time, he knew nothing, had no symptoms, and had no diagnosis. His damages would have been purely speculative. That is, the claim would have been non-existent, because John Askin did not have any diagnosable symptoms, injury, or disease until more than thirty years after he left college football. That is exactly why the discovery rule applies in a latent disease case.

Defendants are seeking is a draconian narrowing of Kentucky's discovery rule to exclude latent brain disease cases brought by former college football players. The Ohio appellate courts in *Schmitz* saw this for what it is and held that there was nothing in the *Schmitz* complaint that showed the plaintiff had notice of an injury or the latent disease prior to his diagnosis. *See* Exhibit 1 at ¶¶ 24-29 and Exhibit 2 at ¶¶ 25, 30-31. The same is true here. Plaintiff John Askin respectfully requests that this Court deny the Motion to Dismiss and allow the parties to proceed

to discovery and a jury trial.

FACTS THAT MUST BE TAKEN AS TRUE

John Askin played football from between 1982 and 1986 at Notre Dame. Verified Complaint at ¶ 21. When he played, he was exposed – like all other Notre Dame and NCAA football players – to the risk of developing long-term brain disease caused by concussive hits to the head. Verified Complaint at ¶¶ 171, 173, 176. At no time, either during college or for many years after he played football, did John Askin ever know or realize he had been exposed to the risk of latent brain disease during football. Verified Complaint at ¶¶ 69, 129. The football leadership of Notre Dame never recognized that he sustained a head injury of any kind. Verified Complaint at ¶¶ 78-79. At no time did Notre Dame ever test or examine John Askin for concussion symptoms or advise or educate him about what a concussion. Verified Complaint at ¶¶ 79-83. At no time were any symptoms that he experienced recognized by him or Notre Dame as an injury that should be monitored, treated, or even acknowledged. Verified Complaint at ¶¶ 80, 86. At no time at Notre Dame was John in a position to understand or appreciate the risks of concussive and sub-concussive impacts. Verified Complaint at ¶ 11.

Instead, John Askin relied upon the guidance, expertise, and instruction of both Notre Dame and the NCAA regarding the life-altering medical issues of concussive and sub-concussive risk in football. Verified Complaint at ¶¶ 165, 184-185. At all times, the Defendants had superior knowledge of material information regarding the effect of repetitive concussive events. Verified Complaint at ¶¶ 167-168, 184. Because such information was not readily available to John Askin, the Defendants knew or should have known that John Askin would act and rely upon the guidance, expertise, and instruction of the Defendants on this crucial medical issue, while at Notre Dame and thereafter. Verified Complaint at ¶¶ 168, 184. Given the Defendants'

superior knowledge and unique vantage point, John Askin reasonably relied on them for guidance on health and safety issues, such as disclosing to him information, precautionary measures, and warnings about the consequences of repetitive head impacts in football. Verified Complaint at ¶¶ 157, 184.

The Verified Complaint, in pertinent part, states as follows:

> 78. At no time, however, did John Askin or the Notre Dame coaching and training staff ever recognize that any concussive symptom sustained by John Askin was an injury to be monitored, treated, or even acknowledged.
>
> 79. At no time while John Askin played football at Notre Dame did a Notre Dame football coach or trainer advise or send John Askin to see a neurologist to test for concussion symptoms or advise him on his neuro-cognitive health.
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> 80. John Askin sustained four concussions as a player at Notre Dame that were recorded by Notre Dame, but not once did any Notre Dame coach or trainer (a) remove John Askin from a practice or game; (b) advise him of the short and long-term dangers of latent brain disease caused by MTBI in football; or (c) hold him out of a practice or game as a result of a suspected concussive injury; or (d) do anything at all to protect his short-term and long-term neurocognitive health.
>
> 81. To the contrary, the standard policy of Notre Dame coaches and trainers was not to recognize concussive symptoms at all and to return John Askin and other football players into the practice or game as quickly as possible regardless of whether or not they had sustained any symptoms.
>
> 82. On information and belief, John Askin (and his teammates) sustained many more concussive injuries while players on the Notre Dame football team, but never recognized them at the time and were discouraged from reporting them, because to report them would be contrary to the code of Notre Dame football.
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> 83. At no time while John Askin played football at Notre Dame did anyone (a) test or examine him for concussion symptoms; (b) advise or educate him about what a concussion is; (c) advise or educate him about what concussion symptoms are; or (d) advise him about the long-term latent brain disease risks of MTBI in football.

Verified Complaint at ¶¶ 78-83.

The Verified Complaint alleges that the blows to the head John Askin sustained (like any other Notre Dame football player) exposed him to the risks of latent and long-term brain disease

with which he was diagnosed decades later.[7] *See* Verified Complaint at ¶¶ 98, 139, 162, 166, 171, 173, 175-177, 180-183.

The Verified Complaint puts the Defendants on notice that this case is about (1) Defendants' negligent or willful exposure of college football players to an elevated risk of long-term latent brain disease and (2) the manifestation of that brain disease in John Askin decades later. This is no different from pleadings the Court would expect in exposure cases involving inhalation or ingestion of chemicals. Those cases allege an exposure (recognized by plaintiff at the time it occurred) and then a latent disease manifest years later caused by the earlier exposure.

The same is true here. After John Askin left college football, he was employed and led a normal life. *See* Verified Complaint at ¶ 151. Decades later, he was diagnosed with neurodegenerative brain disease caused by head impacts in football. Verified Complaint at ¶¶ 20-21. At diagnosis, John Askin was 55 years old and unemployable. He suffered from severe memory loss, cognitive decline, and dementia. Verified Complaint at ¶¶ 20, 154.

ARGUMENT

Under Kentucky law, at this stage of the pleadings a dismissal is not appropriate unless the face of a verified complaint establishes that the case is time-barred. Where the complaint fails to establish that the claim is time-barred, such as when the discovery rule applies, the motion to dismiss should be denied. *See Tomlinson v. Siehl*, 459 S.W.2d 166, 167 (Ky. 1970) (denying motion to dismiss in medical malpractice case, where the injury to the plaintiff and negligence of defendant were not knowable until the plaintiff discovered them); *Louisville Trust Co. v. Johns Manville Prods. Corp.*, 580 S.W.2d 497, 500-501 (Ky. 1979) (motion to dismiss denied and discovery rule applied where mesothelioma victim was diagnosed with latent lung

[7] By implication, Defendants argue that latent brain disease late in life is the same injury as a concussive blow to the head. That is a dispute of medical fact subject to discovery and a trial by jury.

disease many years after exposure and only then knew he had the disease, knew there was a culpable defendant, and knew he had a claim.) *See also Carroll v. Owens-Corning Fiberglas* Corp., 37 S.W 3d 699, 700 (Ky. 2001) (the plaintiff's mesothelioma, diagnosed seven years after his diagnosis for asbestosis, was not barred by time; under Kentucky law, mesothelioma was a separate and new disease, and limitation period began to run on date of mesothelioma diagnosis).

In cases such as this one, the legal standard requires the Court to decide when the actual injury sued upon, and the claim itself, was known or even knowable until the plaintiff received a diagnosis from a competent medical professional. Here, there is nothing in the Verified Complaint that shows John Askin knew he had latent brain disease at age 22. To the contrary, John Askin led a normal life until he was diagnosed more than thirty years later. *See* Verified Complaint at ¶ 151 . As in *Louisville Trust*, *Carroll* and *Tomlinson*, this is a latent disease case. The discovery rule applies. Neurodegenerative brain disease is not less complicated than mesothelioma, and it is, therefore, precisely the kind of unknowable latent disease that requires the application of the discovery rule.

A. Plaintiff's Negligence Claim is Not Barred by Kentucky's One-Year Statute of Limitations

Defendants incorrectly contend that Plaintiff's negligence claim is barred by Kentucky's one-year statute of limitations for personal injury claims under KRS 413.140(1)(a).

The specific injury at issue, however, is latent brain disease, including symptoms of traumatic encephalopathy (sometimes called CTE), with which Plaintiff John Askin was recently diagnosed. *See* Verified Complaint at ¶¶ 10, 67, 175. Plaintiff's Complaint clearly and plainly states: "On February 15, 2018, John Askin was diagnosed by a board-certified neurosurgeon and neurologist with neurodegenerative disease that is most likely CTE." Plaintiff's Complaint at ¶

154. Plaintiff filed his Complaint within one year of the date of his diagnosis. Therefore, Plaintiff's Complaint was timely filed and is not barred by KRS 413.140(1)(a).

Despite the Verified Complaint, Defendants would like this Court to believe that the injury claimed happened more than thirty years ago. In the Motion to Dismiss, Defendants argue that Plaintiff's negligence claim is barred because Askin's injury "accrued" when he played football at Notre Dame, and that John Askin is bringing suit to recover for the "full extent" of injuries he experienced as a Notre Dame football player in the 1980s. In support of their assertion, Defendants largely rely upon *Caudill v. Arnett*, 481 S.W. 2d 668 (Ky. Ct. App. 1972). In *Caudill*, the plaintiff was injured in an accident when a school bus in which he was a passenger overturned. *Id.* at 668. The court noted that the plaintiff's "injuries appeared to be minor; yet, from that time on he complained of continuous chest and back pain." *Id.* at 669. More than six years after the accident, the plaintiff underwent exploratory surgery resulting in a diagnosis of chronic pancreatitis which the doctor said was caused by the injury the plaintiff sustained in the school bus accident. *Id.* Although the plaintiff filed suit within one year of his diagnosis with chronic pancreatitis, the trial court held that the complaint showed on its face that the action was barred by the statute of limitations and the appellate court affirmed. In affirming, the Court of Appeals noted that it did "not consider this to be a 'discovery of injury'" issue and concluded: "The appellant's cause of action . . . accrued on the day he was injured in the school bus accident, and limitations began to run on that date even though he was not made fully aware of the extent of his injjry [sic] until several years later." *Id.* at 669.

Unlike in *Caudill* — where there was a known injury, known cause of the injury (the bus accident) and a known defendant (the bus company) — Plaintiff here alleges that "[a]t no time . . . did John Askin or the Notre Dame coaching and training staff recognize that any concussive

symptom sustained by John Askin was an injury to be monitored, treated or even acknowledged." Complaint at ¶¶ 78. There is nothing in the Complaint that suggests that Askin thereafter experienced or complained of any continuous pain like the plaintiff in *Caudill*. Instead, Plaintiff alleges that he now suffers from "latent degenerative brain disease." Complaint at ¶ 175. Thus, on the face of the Complaint, and as set forth in detail below, this is not an "extent of the injury" case but, rather, a latent disease case in which the "injury was of an inherently unknowable nature." *See, e.g., Louisville Trust Co., supra,* 580 S.W. at 501 (citation omitted).

In support of their "extent of the injury" argument, Defendants also rely upon *Farmers Bank and Trust Company of Bardstown v. Rice*, 674 S.W. 2d 510 (Ky. 1984). *Farmers Bank* is also distinguishable from the instant case. In *Farmers Bank*, the plaintiff sought treatment for a lump on her breast in May 1979, and at that time it was diagnosed as mastitis. *See Id.* at 510. In September 1979, she underwent a series of operations in which cancer was discovered. *Id.* For the next two years, the plaintiff underwent treatment and, at some point, her cancer went into remission. *Id.* at 510-11. In May 1981, she was discovered to have cancer of the brain and lungs, and a medical malpractice action was filed in July 1981 for the initial failure to diagnose breast cancer in May 1979. *Id.* at 511. In finding that the plaintiff's claims were barred by the one-year statute of limitations, the *Farmers Bank* Court concluded that "[a]lthough the full extent of the alleged injury or malpractice may not have become totally apparent until the reappearance [of the cancer], the alleged medical negligence was discovered, or should reasonably have been, on September 19, 1979" (when the cancer was diagnosed). *Id.* (citations omitted).

Here, unlike in *Farmers Bank*, Plaintiff filed his complaint within one year after his diagnosis with latent brain disease (*i.e.*, the discovery of his injury). There is nothing in the

Complaint that suggests he was diagnosed with latent brain disease at any time before February 15, 2018 or that his February 15, 2018 diagnosis was the "reappearance" of any earlier diagnosis of latent brain disease. Rather, the Complaint alleges that Plaintiff was diagnosed with latent brain disease on February 15, 2018, and he filed suit within one year of the diagnosis.

Finally, while repeatedly citing and relying upon the "extent of the injury" language used by the Kentucky Court of Appeals in *Caudill*, Defendants fail to mention that *Caudill* was later distinguished by the Kentucky Supreme Court in *Carroll v. Owens-Corning Fiberglas Corporation*, *supra*, 37 S.W. 3d 699 (Ky. 2000).

In *Carroll*, the Kentucky Supreme Court considered a certified question from the Sixth Circuit Court of Appeals and concluded that:

> while Kentucky ha[d] never been a "two disease" state (which would allow for recovery following the discovery of each disease), because asbestosis and lung cancer are separate and distinct diseases, both arising from asbestos exposure, Kentucky's one-year statute of limitations should not bar Appellant's cancer claim simply because Carroll did not pursue a potential claim for the fear or the enhanced risk of developing cancer following an asbestosis diagnosis seven years earlier.

Id. at 700.

In reaching this conclusion, the Court noted that "[w]hen Carroll was diagnosed with asbestosis, he did not necessarily know, nor should he have known that he would also eventually develop lung cancer. Only actual knowledge or knowledge of the probability of disease triggers the statute of limitations under a *Louisville Trust, supra*, analysis." *Carroll*, 37 S.W. 3d at 701. The Court also extensively quoted from a District of Columbia Court of Appeals opinion written by then-Circuit Court Judge Ruth Bader Ginsburg, as follows:

> This case requires us to focus, not on judgments or their preclusive effects, but on statutes of limitation and the policies they implicate in personal injury actions . . . . Upon diagnosis of an initial illness, such as asbestosis, the injured party may not need or desire judicial relief . . . . If no further disease ensues, the injured party

> would have no cause to litigate. However, if such a person is told that another, more serious disease may manifest itself later on, and that a remedy in court will be barred unless an anticipatory action is filed currently, there will be a powerful incentive to go to court, for the consequence of a wait-and-see approach to the commencement of litigation may be too severe a risk.

Id. at 702 (quoting *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 118 (D.C. 1982)).

In *Carroll*, the Kentucky Supreme Court observed:

> When James Carroll was diagnosed with asbestosis in 1983, he should not have been obligated to predict cancer, nor should he be penalized for suing for the greater, more provable damage, rather than taking up judicial resources attempting to prove the ephemeral damages covered by "enhanced risk or fear of cancer." Because of the length of time between the diagnoses of these two diseases, it is possible that an asbestosis suit could have been filed and adjudicated before he ever knew he had cancer, leaving him no direct remedy for the more serious disease.

Id. at 702. The Court further reasoned that "[a]sbestosis does not necessarily progress to lung cancer.[8] James Carroll's knowledge of asbestosis did not make his lung cancer any more knowable or give him reason to expect it. Therefore, we hold that the action for cancer accrued on the date of the diagnosis of the cancer." *Id.* at 703.

Similarly, John Askin has now sued to recover for the latent brain disease with which he was recently diagnosed. Had Mr. Askin filed suit in 1987 (one year after he last played football at Notre Dame), any claim for latent brain disease would have been premature and purely speculative. In accordance with *Carroll*, "Kentucky's one-year statute of limitations should not bar Plaintiff's [latent disease] claim simply because [he] did not pursue a potential claim for the fear or the enhanced risk of developing" latent brain disease more than thirty years ago. S*ee* *Carroll*, 37 S.W. 3d at 700.

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[8] So too, and even more so, concussive symptoms (e.g., transient dizziness, seeing stars, headaches and disorientation) during college football games and practices do not automatically become latent brain disease later in in life).

Moreover, the Plaintiff here did not even have the ability to sue for an enhanced risk or fear of later developing latent brain disease in 1987 because, as stated on the face of the Complaint: "Notwithstanding their superior knowledge of the risks of latent brain disease to college football players . . . Defendants never once advised or warned John Askin regarding the latent brain disease risks associated with MTBI in college football. . . .", and "[a]t no time while he was a player at Notre Dame or until he was diagnosed in 2018 did plaintiff John Askin ever know or suspect that he had been exposed to an increased risk of long-term neurodegenerative disease and the insidious and latent disease known as CTE." Complaint at ¶¶ 68, 69. *See also* Complaint at ¶ 176 ("At no time prior to being diagnosed was John Askin ever aware that he had been exposed at Notre Dame to an elevated risk of latent long-term neurodegenerative brain disease at Notre Dame.").

Here, Plaintiff's action for latent brain disease did not accrue until the date on which he was diagnosed with latent brain disease (February 15, 2018). *See Carroll*, 37 S.W. 3d at 703. Plaintiff filed his complaint within one year of that date, and therefore, his negligence claim is not barred by Kentucky's one-year statute of limitations.

B. Kentucky Law Recognizes the Discovery Rule in Multiple Contexts.

The Defendant's argument that Kentucky courts have refused to extend the discovery rule beyond the General Assembly's statutory enactments relating to malpractice claims and beyond toxic exposure cases is not an accurate statement of the case law.

In 1979, the Kentucky Supreme Court extended the discovery rule beyond its statutory parameters when it recognized that the requirement of a plaintiff's discovery of an injury is no stranger to Kentucky law. The Kentucky Supreme Court referred to the state's workers compensation system and concluded that there was no compelling policy-based reason for a

distinction between a plaintiff injured by medical malpractice and a plaintiff injured by latent disease caused by a harmful substance. *Louisville Trust Co., supra,* 580 S.W. 2d at 500-501. In *Louisville Trust*, the Kentucky Supreme Court held that the just application of Kentucky's discovery rule meant that "a cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Id.* at 501 (*citing Raymond v. Eli Lilly & Co.*, 371 A.2d 170, 174 (N.H. 1977)).

In 1991, the Kentucky Supreme Court held that in a products liability action arising from use of a defective product in building construction, the statute of limitations begins to run on the date the homeowner knew or should have known (a) that he had been injured but also (b) that his injury might have been caused by the defendant's conduct. *Perkins v. Northeastern Log Homes*, 808 S.W. 2d 809, 819 (Ky. 1991). Twelve years later the Kentucky Supreme Court again embraced the quote from *Perkins* by the New Hampshire Supreme Court and applied the Kentucky discovery rule to be fair to a plaintiff who did not and could not have discovered an injury and its cause until far later in time. The foregoing cases alone show that the Defendants' argument that the Kentucky courts have refused to extend the discovery rule beyond the General Assembly's statutory enactments is not true.

The Defendants also contend that John Askin's negligence claim does not fall within the Kentucky Supreme Court's expansion of the discovery rule. They claim that the neurodegenerative brain disease from which Askin suffers is not a latent disease. First, this is a factual dispute that requires discovery and a trial. It cannot be decided on a motion to dismiss. Second, John Askin's neurodegenerative brain disease precisely meets the definition of a latent disease. Concussions and concussive symptoms, as alleged in the Complaint, are transient and

disappear; they provide no notice to a college football player that one day later in life he will develop progressive brain disease. It is not materially different from an asbestos worker having a transient cough from asbestos exposure that thirty years later develops into mesothelioma. The first is not the second, and the first gives the plaintiff no notice that a latent life-ending lung disease will develop many years later.

Thus, the condition for which John Askin is seeking damages is a disease that had not yet developed at the time John Askin played college football. At the time of his transient concussive symptoms, and for many decades thereafter, John Askin's brain health was normal and there was no possibility of any diagnosis at all. The latent disease itself was beyond the limits of his human experience or understanding, and it was not diagnosable. It was not until he was diagnosed more than thirty years later that he knew or could have known that the conduct of the NCAA was responsible for the disease from which he is suffering.

This is the same rationale the Supreme Court of Kentucky used in *Louisville Trust Co.* to extend the discovery rule to a claim for latent lung disease caused by asbestos exposure decades earlier. The Supreme Court of Kentucky reasoned that when the disease or injury was latent and/or inherently unknowable (for example, silicosis of the lung, mesothelioma, or an injury from medical malpractice), the plaintiff's claim accrues on the date of discovery of the injury (or when the plaintiff should have discovered it). *Id.* at 500. The Supreme Court agreed with the New Hampshire Supreme Court's rationale when it extended this discovery rule to products liability cases. In *Louisville Trust Co.*, the court quoted the New Hampshire Supreme Court in *Raymond v. Eli Lilly & Co.* and found that the formulation was a "workable and just" application of the discovery rule. The Supreme Court of Kentucky quoted and adopted the rule:

> [when] the injury and the discovery of the causal relationship do not occur simultaneously, it is important to articulate exactly what the discovery rule

> means. We believe that the proper formulation of the rule and the one that will cause the least confusion is the one adopted by the majority of courts: A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.

Louisville Trust Co., 580 S.W.2d at 501 (*quoting Raymond v. Eli Lilly, supra, 371 A.2d at 174*) (emphasis added). This is the standard under Kentucky law for how and when the discovery applies to a latent disease case, and nothing in that standard restricts the discovery exclusively to toxic exposure and medical malpractice cases.

C. Other Courts Have Applied the Discovery Rule to Latent Brain Disease Cases

Courts in other states have addressed this issue. Seven months ago, the Supreme Court of Ohio rejected the same arguments by the same Defendants. The court ruled that the discovery rule applied to a latent brain disease case brought by former football player Steve Schmitz against Notre Dame and NCAA in 2014. *Schmitz v. National Collegiate Athletic Association*, attached as Exhibit 1. In *Schmitz*, the plaintiff alleged – as John Askin alleges here – that he developed latent brain disease (caused by head impacts in football) that did not manifest or become diagnosable until more than thirty years later. *Id.* at ¶¶ 4, 5 and 6. The Defendants argued in *Schmitz* what they argue here, that Steve Schmitz allegedly knew he was injured when he was a college football player and, therefore, was suing on an extent of the injury theory. *Id.* at ¶ 19. The Supreme Court of Ohio rejected that argument and stated that concussive symptoms did not put Steve Schmitz on notice of either latent brain disease decades later or that the Defendants were culpable. *Id.* at ¶ 25. The court referred directly to toxic inhalation[9] and

[9] The Supreme Court of Ohio relied on its own opinion in *Liddell v. SCA Serv. Of Ohio, Inc.*, 70 Ohio St.3d 6 (1994). In *Liddell*, a police officer suffered inhalation of toxic fumes from an overturned tanker truck and showed symptoms. Liddell did not discover the latent disease of cancer until long after the two-year limitations period had expired. The Supreme Court held for Liddell. Had he brought a case within

medical malpractice cases where plaintiffs did not know they had an injury, did not know that the defendant was culpable, and did not know of a claim until many years later. *Id.* at ¶¶ 23-31. In the *Schmitz* concurring opinion, two Justices of the Ohio Supreme Court succinctly stated the rule in Ohio that is identical to the rule in Kentucky:

> Raising the statute of limitations in a ... motion to dismiss serves merely as a method for expeditiously raising the statute of limitations defense. A court may dismiss a complaint ... as untimely only when, after accepting the material allegations as true and making all reasonable inferences in favor of the plaintiff, the complaint shows conclusively on its face that the action is time barred..
>
> On the face of the amended complaint, [plaintiffs] have asserted latent injuries and the latent effects of injuries sustained approximately 40 years ago. The amended complaint contains no allegations that compel the conclusion that Schmitz knew, or should have known, more than two years before he commenced this action that appellants were responsible for his alleged injuries. Therefore, based on the face of the amended complaint, there is no way to conclusively determine that [plaintiffs'] claims are barred by the statute of limitations, and dismissal ... is therefore not appropriate. Appellees were not done in by their own pleadings.

See Exhibit 1, *Schmitz v. NCAA, et al.* at ¶¶ 42-43 (internal citations and quotation marks omitted). *See also, Tomlinson v. Siehl, supra*, 459 S.W. 2d at 167 (stating the same rule with respect to a motion to dismiss based on the affirmative defense of the statute of limitations.) Every justice of the Supreme Court of Ohio agreed on this issue and sent the case back to the trial court, where discovery has commenced. They affirmed the *per curium* opinion of Ohio's Eight District Court of Appeals, attached as Exhibit 2, that the discovery rule applied to the *Schmitz* claims and dismissal at the pleading stage was reversible error.

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the limitations period for latent undiagnosed cancer, the defendant would have moved to dismiss and won, because the cancer was speculative and undiagnosed. The same is true in *Schmitz* and *Askin*. The Defendants seek to force upon the plaintiff the impossible. Just as the Ohio courts rejected this argument in *Schmitz*, John Askin respectfully request that this Court reject it here.

The same result can be found in every judicial opinion that has addressed a claim for latent brain disease arising from sports-related head injury. For example, Minnesota District Court Judge Susan Richard Nelson refused to dismiss the latent brain disease claims of former professional hockey players in a mass tort and allowed the case to proceed to discovery. *See In re NHL Players Concussion Injury Litigation*, MDL No. 14-2551, 2015 U.S. Dist. LEXIS 38755 (D. Minn. Mar. 25, 2015). The hockey players alleged, *inter alia*, that the NHL is responsible for "the pathological and debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained . . . during their professional careers." Id. at *2 (citation omitted). The named plaintiffs claimed they had suffered numerous concussions and sub-concussive hits while playing hockey over time periods ranging from 1977 through 2008. *Id.* at *3-4 (citations omitted). According to the players, the repeated concussions "can trigger progressive degeneration of brain tissue and can lead to Alzheimer's disease, dementia, and chronic traumatic encephalopathy ("CTE") (a disease caused by the accumulation of toxic protein in the brain)." *Id.* at *4.

The NHL, like the Defendants here, filed a motion to dismiss and argued that "the relevant statutes of limitations periods began to run on the dates on which the head injuries that [the plaintiffs] allegedly suffered occurred, and the fact that those injuries may have progressed into more complicated medical conditions does not re-start the limitations period." *Id.* at *13-14 (citation omitted). The players argued that "...the injuries at issue are not the discrete head injuries they suffered while playing in the NHL, but rather are the increased risk and development of permanent degenerative brain diseases that resulted from the repeated injuries and 'which arose and of which [the plaintiffs] became aware only after [the plaintiffs] retired from the NHL.'" *Id.* at *14-15 (citations omitted).

Judge Nelson held for the plaintiffs. As in Kentucky and Ohio, the discovery rules in Minnesota, New York, and the District of Columbia (the states and district whose law the plaintiffs identified as applying to that case) recognize that in some cases the actual damage sued upon (latent brain disease) manifests far later in time that the injury itself (i.e., head impacts in football) as well as the discovery by the plaintiff of a defendant's misconduct that would give rise to a claim. *Id.* at *5-6. The face of the hockey players' complaint showed then, as does John Askin's Complaint shows now, that the claims were for latent brain disease were not discoverable until manifestation and diagnosis. *Id.* at *7. Judge Nelson held that the claims could proceed and were not subject to a motion to dismiss.

This same holding was rendered by the Pennsylvania Court of Common Pleas in *Onyshko v. Nat. Collegiate Athletic, Ass'n*, No. 2014-3620, 2017 WL 6940497 (C.C.P. Wash. County March 24, 2017). At issue was whether the discovery rule in Pennsylvania suspends the running of the limitations period when the plaintiff, a former NCAA football player, was reasonably unaware that his injury (ALS) was caused by the defendant's (NCAA) conduct at the time he knew he had ALS. The Pennsylvania court denied summary judgment to the NCAA and stated that reasonable minds could differ regarding whether the plaintiff Matthew Onyshko could have known that the ALS from which he suffered was caused by the repetitive head impacts he sustained in NCAA football unless and until he received a competent medical opinion. Under those circumstances, it became a question of fact for the jury to decide and not an appropriate subject for a motion for summary judgment. *Onyshko*, 2017 WL 6940497 *1-2. As of this filing, the parties in *Onyshko* have picked a jury and are trying the case. *See also McCullough v. World Wrestling Entertainment, Inc.*, 172 F.Supp.3d 528, 546-550 (D. Conn. 2016) (district court denied defendants' motion to dismiss, because it was not clear on the face of the complaint

that plaintiffs had an actionable case when they sustained head impacts during wrestling matches but, rather, made out a plausible claim for latent brain disease that developed much later).

D. <u>The Discovery Rule Applies to John Askin's Case.</u>

In this case, John Askin did not discover latent brain disease for more than thirty years after he quit playing NCAA/Notre Dame football. Had he filed a claim in 1987 (one year after he graduated from college), an assertion of undiagnosed and not manifest future brain disease would have been speculative and dismissed. The purpose of the discovery rule, as expressed by the Kentucky Supreme Court in many cases, including *Louisville Trust Co.*, is to prevent the kind of manifest injustice and patent unfairness requested of this Court by the NCAA and Notre Dame. A plaintiff cannot and must not be held to a limitations period for a latent disease for which he has no symptoms or knowledge and a claim of which he is unaware. For those reasons, John Askin respectfully requests that the Court reject the Defendants' arguments, as other courts have, and permit Askin the genuine opportunity to pursue this cause of action which he timely filed under the proper application of Kentucky's discovery rule.

E. Plaintiff's Fraudulent Concealment and Constructive Fraud Claims are Not <u>Barred.</u>

Kentucky has a five-year statute of limitations for fraud claims. KRS 413.120(1). Pursuant to the statute, in an action for fraud or mistake, "the cause of action shall not be deemed to have accrued *until the discovery* of the fraud or mistake." KRS 413.130(3) (emphasis added). Here, Plaintiff's cause of action did not accrue until February 2018 when he was diagnosed with latent degenerative brain disease. Although John Askin filed his Complaint within five years of discovering the fraud as defined in KRS 413.130(3), the provision also includes a statute of repose, providing: "However, an action for relief or damages for fraud . . . shall be commenced within ten (10) years after . . . the perpetration of the fraud." Based on this language, Defendants

argue that Plaintiff alleges Defendants "perpetrated the fraud" when John Askin played football at Notre Dame between 1982 and 1986 and, therefore, Plaintiff's fraud claims are barred by Kentucky's ten-year statute of repose. *See* Motion to Dismiss at 22.

Nevertheless, the statute of limitations for fraud claims is tolled if the defendant absconds or conceals himself "or *by any other indirect means* obstructs the prosecution of the action." KRS 413.190(2)[10] (emphasis added). In this case, Plaintiff's claims for fraudulent concealment and constructive fraud are based on, among other things, "Defendants' knowing concealment of and/or willful blindness to the dangers of long-term latent brain disease," Plaintiff's Verified Complaint at ¶ 185, "leading Plaintiff John Askin to believe he was safe and that he would not suffer any long-term debilitating cognitive injuries from playing football," Plaintiff's Verified Complaint at ¶ 194. Prior to the time of his diagnosis in 2018, Plaintiff John Askin did not—and could not have been reasonably expected to—discover that Defendants concealed the dangers of latent brain disease from him precisely because Defendants fraudulently concealed this information from him. *See, e.g.*, Complaint at ¶¶ 176, 185, 193-194. Thus, the limitation period was tolled by KRS 413.190(2), and Plaintiff's fraud claims are not barred by Kentucky's statute or repose. *See Dodd v. Dyke Industries, Inc.*, 518 F. Supp. 2d 970, 973-74 (W.D. Ky. 2007) (considering relationship between tolling of statute of limitations due to obstruction and concealment under KRS 413.190(2) and Kentucky's statute of repose for fraud claims under KRS 413.130(3) and noting that Kentucky courts have applied KRS 413.190(2) to "'keep alive' a fraud claim beyond 10 years," albeit in context of fiduciary relationships).

[10] While KRS 413.190(2) refers to causes of action that accrue against "a resident of this state" both Defendants should be considered residents of this state for purposes of this argument. Defendant NCAA is an unincorporated association with member institutions in every state, Plaintiff's Verified Complaint at ¶ 30, and Notre Dame is a member of the NCAA, does regular business every year in Kentucky, and is subject to jurisdiction in this District. *See* Verified Complaint at ¶ 24, 41.

Furthermore, public policy and equitable considerations dictate that Plaintiff's fraud claims should not be barred by Kentucky's ten-year statute of repose. First, Defendants should not be able to take advantage of the "perpetration of the fraud" language of the statute of repose where they actively concealed information from John Askin about an increased risk of latent brain disease and continued do so for more than thirty years thereafter. Applying the statute of repose in such a circumstance will encourage defendants to continue perpetrating fraud long enough to escape liability and will otherwise reward culpable behavior. Second, Defendants should be equitably estopped from relying on the statute of repose because this case involves truly exceptional circumstances in which Plaintiff's injury was not immediately discoverable and Defendant's concealed their role in causing Plaintiff's injury through concealment and misrepresentation. *See Fluke Corp. v. LeMaster*, 306 S.W. 3d 55, 67 (Ky. 2010) (noting that "injured parties have the duty to act diligently to investigate apparent possible causes of their injuries to pursue claims within the statute of limitations," and "[g]iven this duty, the statute of limitations will begin to run immediately because the accrual of the cause of action or tolling the running of the statute of limitations by operation of the discovery rule or *doctrine of equitable estoppel is reserved for truly exceptional circumstances, such as where the injury itself is not immediately discoverable or the product's potential role in causing injury is actively concealed by the defendant's concealment or false representations*") (emphasis added).

In light of the allegations set forth in the Complaint, John Askin's case is truly the "exceptional circumstance" contemplated by the Kentucky Supreme Court in *Fluke*.

F. <u>Punitive Damages</u>

Although Defendants acknowledge that punitive damages are a remedy potentially available to Plaintiff John Askin, Defendants also assert that the Plaintiff cannot be entitled to

punitive damages because he does not have any viable, timely, underlying claims. *See* Motion to Dismiss at 22-23. This is inverted logic and puts the cart before the horse. As explained above, John Askin's tort claims are timely, viable, and serious. Therefore, they are not subject to dismissal, and the punitive damage cannot be dismissed without a full factual record and decision by a jury. The jury in this case should be permitted to evaluate the factual record and assess whether punitive damages are appropriate under KRS 411.184-186. The statute's requirements, including a showing of "oppression," "fraud," or "malice," are set forth in, among other paragraphs, paragraphs 203 through 207 of Plaintiff's Complaint. Plaintiff John Askin also included "[p]unitive damages pursuant to the law of Kentucky," as one of his prayers for relief. Plaintiff's Verified Complaint at p. 43. At this stage, before any discovery has taken place and before any evidence has been presented to a jury, it is premature to determine whether punitive damages may ultimately be awarded to Plaintiff; rather, Plaintiff must be permitted to preserve the right to pursue punitive damages, which he has done through his Complaint.

G. Public Policy is in Favor of John Askin and the Discovery Rule.

Public policy favors John Askin, not the Defendants. Defendants seek to roll back Kentucky law and require John Askin to have filed a claim more than thirty years before he had symptoms, a diagnosis, or any knowledge of the Defendants' culpable conduct. This is what the discovery rule prevents, the injustice that would flow from penalizing a plaintiff for not filing a claim at a time when he had no disease, no diagnosis, and no knowledge of the claim. *Louisville Trust Co.* and its progeny control this case and protect plaintiffs like John Askin from the nonsensical result the Defendants seek here. Further, the Defendants cite two inapposite cases[11]

[11] Defendants cite *Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. 1988) and *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992) for the proposition that the purpose of statutes of

that have no bearing to this case. Both recite well-known public policy underlying statutes of limitations (to prevent the adjudication of stale claims), which is not at issue here. Defendants simply seek to re-wind the clock of Kentucky jurisprudence and invent a special exception for a latent brain disease cases caused by college football.

Moreover, John Askin's claim is fresh, not stale. It is based on a competent first diagnosis that occurred within one year of the Complaint's filing. The passage of time is of no moment. The vast majority of teammates with whom John Askin played football are alive and well and in their mid-50s. Their memories have not faded. In some ways, they are as vivid today as they were three decades ago.

CONCLUSION

For all of the foregoing reasons, Plaintiff John Askin respectfully requests that the Court deny Defendants' Motion to Dismiss and allow discovery to proceed.

Dated: May 13, 2019

Respectfully submitted,

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limitations is to prevent the bringing of stale claims. This underlying rational does not destroy Kentucky jurisprudence applying the discovery rule to latent disease cases.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 2018, a true copy of the foregoing Opposition of Plaintiff John Askin to Defendants' Motion to Dismiss was filed with the Court, and it was served upon the following counsel of record via electronic mail:

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